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# Recent Cases

# RECENT CASES

## *McQUAIL v. SHELL OIL CO.*: DELAYED ZONING OR FLOATING ZONE?

In *McQuail v. Shell Oil Co.*,[1] the Supreme Court of Delaware held that rezoning orders in New Castle County need not be "in accordance with a comprehensive plan"[2] since neither the Delaware Constitution[3] nor the state enabling act[4] requires it. The court also held that some sort of plan is required,[5] but the zoning plan required by statute[6] is all that is necessary, and the reclassification in question did bear a reasonable relation to the scheme of zoning adopted in that plan. The *Shell* case is noteworthy for at least two reasons. The first is that Delaware, unlike most jurisdictions,[7] has no requirement that zoning be "in accordance with a comprehensive plan." The second concerns the "floating zone"[8] concept which seems to be implicit in the New Castle County Zoning Code.[9] It is the purpose of this Case Note to review the court's reasoning as to what type plan is required for zoning in that county and to examine the floating-zone idea in the Zoning Code in light of the cases in other jurisdictions dealing with the concept. The floating-zone concept will be examined with a view toward its compatibility with the traditional concept of spot zoning[10] and with respect to the special problems existing in zoning for undeveloped areas and for industrial

1. — Del. —, 183 A.2d 572 (1962), *affirming* Dukes v. Shell Oil Co., 177 A.2d 785 (Del. Ch. 1962).

2. The origin of the "comprehensive plan" requirement is in DEPARTMENT OF COMMERCE: A STANDARD STATE ZONING ENABLING ACT (1926), found in 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 877-82 (3d ed. 1957). See generally Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

3. DEL. CONST. art. 2, § 25.

4. DEL. STAT. ANN. tit. 9, §§ 2601-23 (1953).

5. — Del. at —, 183 A.2d at 578.

6. DEL. STAT. ANN. tit. 9, §§ 2607-08 (1953).

7. Haar, *supra* note 2, at 1155 n.6, 1156 n.9, 1157 n.14.

8. Also referred to as "flexible selective zoning" in Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960) and "open development zoning" in Note, 40 MINN. L. REV. 286, 288 (1956).

9. The Zoning Code was adopted on September 28, 1954, by the Levy Court of New Castle County pursuant to DEL. STAT. ANN. tit. 9, § 2610 (1953). The Zoning Code was first prepared by the New Castle County Zoning Commission in accordance with DEL. STAT. ANN. tit. 9, §§ 2607-08 (1953), for submission to the Levy Court. On July 26, 1955, the Levy Court amended the basic code with regard to the area in question and designated it primarily as an R-2 (Agriculture and General Purposes) district.

10. See text accompanying note 52 *infra*.

development. The conclusion will suggest what the role of the Delaware courts should be with regard to this floating-zone-type provision.

In late 1960 and early 1961, the Shell Oil Company purchased options on approximately 3,345 acres of farmland[11] in lower New Castle County along the Delaware Bay with a view toward the construction of an eighty million dollar refinery development. The optioned land comprised two large, irregularly shaped tracts with a "corridor" between. All the acreage involved had been zoned R-2 (Agriculture and General Purposes) by the Levy Court[12] of New Castle County in 1954 when it adopted the basic Zoning Code and regulations for those portions of the county lying outside the municipalities. Shell and the owners of the land petitioned the New Castle County Zoning Commission in May, 1961, to have the optioned land reclassified to M-3 (Heavy Industry). After a hearing, the majority of the commission recommended[13] the rezoning action to the Levy Court of New Castle County which, after another hearing, made the legislative decision to rezone only 2,625[14] acres of the lands held on option by Shell. On September 11, 1961, plaintiffs[15] brought action in the Court of Chancery to enjoin the rezoning order, contending, *inter alia*, (1) that the action of the Levy Court was arbitrary and capricious, (2) that rezoning in a "checkerboard pattern" was flagrant spot zoning and (3) that the Levy Court had not rezoned in

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11. In the hearing before the New Castle County Zoning Commission, an attorney for Shell commented as follows:

> At the present time only 40 percent of this land is tillable at all, and only eight percent is rated by the University of Delaware's agricultural experiment station as first-rate farmland.
>
> Most of the people who live within this area have other jobs and very few of them live on farming alone.
>
> There are 2,500 acres, approximately, that are swamp. And I might add, not only the swamp wouldn't support five men per acre, but . . . they tell me it will not support five muskrats on it.

Brief for Appellees, app. p. B39.

12. A Levy Court in Delaware is not a judicial body but is a county commission consisting of three elected commissioners. The Levy Court is created by statute and has limited power to contract and zone. See generally DEL. STAT. ANN. tit. 9, §§ 301-79 (1953). The Supreme Court of Delaware held, in Auditorium Inc. v. Board of Adjustment, 47 Del. (8 Terry) 373, 91 A.2d 528 (1952), that zoning is a legislative matter which the General Assembly has delegated to the legislative body of the political subdivision.

13. Two members voted for rezoning and one against. The dissenting member favored the rezoning generally but thought that something less than the entire area in Shell's petition should be rezoned at this time. — Del. at —, 183 A.2d at 575.

14. The portion not rezoned was largely swamp area which was to be leased to the Delaware Fish and Game Commission and was not desired for industrial development. According to Shell, the area was sought primarily as a water supply. Brief for Appellees, pp. 32-33.

15. Originally there were ten plaintiffs who owned farmland or were residents in the vicinity of the rezoned area. Before the appeal eight had withdrawn leaving only two plaintiffs remaining "who reside some distance from the area involved." — Del. at —, 183 A.2d at 575 n.1.

terms of a plan for the area.[16] The relevant portion of the New Castle Zoning Code is as follows:

> While R-2 districts are designated as one of the R districts, they include large undeveloped areas for which the ultimate purpose cannot now be determined. It is expected that as the development of New Castle County takes place, portions of these R districts will be required for other uses. Requests for rezoning such portions (of R-2) as residential, commercial or industrial districts will be studied and acted upon on their own merits . . . .[17]

Shell argued: (1) that the Delaware statute does not require the formulation of or adherence to a plan separate from the required Zoning Code; (2) that the Zoning Code, which provided for the area to be temporarily zoned R-2 with future rezoning requests to be acted upon individually, was adhered to; and (3) that judicial review should be limited to abuse of discretion, the test being similar to that employed in considering the constitutional validity of a statute.[18]

The lower court held that some sort of plan was contemplated and required by the Delaware statute " in spite of the fact that no express mention is made . . . of a comprehensive plan,"[19] and went on to equate the plan with "due consideration given to the public welfare."[20] The supreme court took the more definite position, however, that the Zoning Code *was* the plan, and if the rezoning action bore a reasonable relation to that "scheme of zoning," the order was valid as to the plan requirement. The court found a reasonable relation between the rezoning order and the Zoning Code since the original zoning was meant to be temporary in nature. The only question then remaining was whether the action of the Levy Court was arbitrary and unreasonable and constituted an abuse of discretion as determined by the *facts and circumstances* of the case.[21] The court found that the presence of industry is designed to serve the general welfare, and concluded that the decision of the Levy Court was "a fairly debatable one upon which it had the exclusive legislative judgment."[22]

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16. The reasoning as a whole shows that the majority of the Levy Court gave no consideration to the larger questions involved in the zoning of two such large tracts of land. They gave no thought to planning for the entire surrounding area, the possibility of zoning only a part M-3 and making concentric circles of other zones. They apparently gave no consideration to the captive land that was going to be entirely surrounded by Shell M-3 areas or the adjacent land. There appears to have been for them simply a black and white question: Shell or nothing.

Brief for Appellants, pp. 18-19.

17. Zoning Code of New Castle County, art. IV, § 2, quoted in McQuail v. Shell Oil Co., *supra* note 1, at —, 183 A.2d at 577-78.

18. Brief for Appellee, pp. 10-25.

19. 177 A.2d at 791.

20. *Ibid.*

21. — Del. at —, 183 A.2d at 579.

22. *Id.* at —, 183 A.2d at 580.

It is significant that the court avoided consideration of the substantive merits of the plan itself, saying:

> [T]he basic zoning Code recognized that the R-2 classification for Blackbird Hundred was not permanent. The fact that further rezoning was necessary because the plan was incomplete as to certain lands not rezoned supports the action taken. When an R-2 classification was adopted the ultimate zoning of such area *was in effect delayed.* The proper authorities have now acted and this action must be upheld unless it constitutes an abuse of discretion.[23]

Indeed, the court appears to be taking the curious position that the land was never really zoned. A later statement seems to bear this out: "Good housekeeping suggests a realistic approach to a growing area by planning for an orderly development using the present embryonic industrial complex as the center from which planned development may grow with logic."[24] Also, the court did not consider the issue of the differently zoned corridor of land between the two tracts rezoned. Since the court has announced that the legislature intended zoning to be in accordance with a plan and since it may well be difficult to convince many that having no definite plan *is* the plan, the remaining portion of this Case Note will be devoted to an examination of the "plan" and an analysis of its merits.

To begin with, zoning according to some sort of plan is at least desirable, since zoning is a *means* to the goals of planned community development as it affects property rights and of general welfare derived from community purpose and efficient government.[25] The value of zoning lies in its effective use as a device for implementing planned future development toward those ends. Effective zoning of undeveloped areas without strait jacketing the future yet without running afoul of constitutional limitations has become one of the most perplexing of modern problems, and has emphasized the basic need for flexibility in zoning techniques.[26] One device recently accepted by a few courts[27] is that of the "floating zone," which may be generally described as follows:

> Usually the idea of floating zones refers to a specialized type of district classification which is not necessarily placed anywhere on the zoning map at the time such classification is written into the text of the zoning ordinance. The district exists as a concept in the zoning ordinance, but figuratively floats above the landscape, in no fixed position, until it is brought down to earth by a boundary-change rezoning amendment.

23. *Id.* at —, 183 A.2d at 578. (Emphasis added.)
24. *Id.* at —, 183 A.2d at 579.
25. See Haar, *supra* note 2, at 1154-55.
26. See Reps, *The Zoning of Undeveloped Areas,* 3 SYRACUSE L. REV. 292 (1952).
27. Cases cited notes 29, 31 and 33 *infra.*

> Floating zone systems commonly, but not necessarily, may involve provisions in the zoning ordinance which openly invite petitions for the floating zone to be filed by persons whose development proposals meet stated conditions. Some floating zone approaches may not label the individualized approach quite so frankly, however.[28]

*Rogers v. Village of Tarrytown*[29] is considered a leading case on this subject although the term "floating zone" was not employed. The Court of Appeals of New York, with one justice dissenting, held valid a 1947 Tarrytown ordinance amendment which created a new class of residential zone for garden-type apartments. The actual boundaries of the zone were neither delineated in the ordinance nor fixed on a map at the time. In response to defendant's individual application, the new zone was applied specifically to her property by another amendment approved a year and a half later. The court said:

> While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise.[30]

Since the *Rogers* case, the principle of the floating zone has also been approved in *Huff v. Board of Zoning Appeals*,[31] where the Maryland Supreme Court upheld a floating-zone provision in the Baltimore County zoning regulations. The provision permitted scattering, throughout undeveloped areas of the county, tracts of five acres or more on which "very light and unoffensive manufacturing operations"[32] would be permitted, and each case was to be judged on its own merits. The *Huff* decision was followed in *Costello v. Sieling*,[33] in which the Maryland Supreme Court upheld a similar floating-zone idea consisting of two ordinances. The first zoning amendment created a T-2 (Trailer Coach Park) district, and a second amendment, which was solicited by individual application, reclassified a tract from residential to the T-2 classification. The rezoned area in the *Costello* case was surrounded by and adjacent to properties devoted to residential and agricultural uses and to the operation of sand and gravel pits.

It is clear from the wording of the Zoning Code in the *Shell* case

28. Craig, *Particularized Zoning: Alterations While You Wait*, 1 PROCEEDINGS OF THE 1960 INSTITUTE ON PLANNING AND ZONING (The Southwestern Legal Foundation) 153, 173 (1961).

29. 302 N.Y. 115, 96 N.E.2d 731 (1951).

30. *Id.* at 121, 96 N.E.2d at 733.

31. 214 Md. 48, 133 A.2d 83 (1957).

32. Diecraft Inc. wanted to build a "one-story plant to be used for the manufacture and assembly of small precision instruments, guided missile parts and electrical and communication devices for the Federal Government." *Id.* at 51, 133 A.2d at 84-85.

33. 223 Md. 24, 161 A.2d 824 (1960).

that it contemplates a temporary zoning plan, and it would seem to embody principles strikingly similar to the essential characteristics of the floating-zone concept.[34] The county Zoning Code mentions the broad categories of residential, commercial and industrial districts which are not located on the zoning map, yet are possibly projected for that area, and specific provision is made for individual requests for rezoning to be acted upon on their own merits. In other words, each district exists "as a concept in the zoning ordinance, but figuratively floats above the landscape, in no fixed position, until it is brought down to earth by a boundary-change rezoning amendment."[35]

The language of the New York and Maryland courts indicates that flexibility is perhaps one of the main virtues of the floating-zone device. The Delaware court had the same idea in mind when it said:

> In light of the nature of the land in the vicinity of the rezoned area in Blackbird Hundred, the Commission and the Levy Court could have reasoned as follows: It is inconceivable that men could at this stage foretell the future use of this part of the county. To zone lands in Blackbird not involved in the case as residential, as park lands, or as industrial is not to plan the future but to dream it, without any sound basis in fact.[36]

The *Rogers* case involved an ordinance affecting a community wherein some visible scheme of development was already in existence. In a more rural area, such as was involved in the *Shell* case, where many lots, presently unoccupied or used for agricultural purposes, are in close proximity to rapidly expanding communities, the need for general flexibility is even greater. The problem the zoning ordinance was designed to combat in the *Huff* case more nearly resembles the situation in the *Shell* case because undeveloped areas were involved in both cases.

Another problem in zoning undeveloped areas is the difficulty of devising flexible zoning controls adequate to meet the needs of industrial development. Planners and developers advise local governments to predetermine specific plans for such development.[37] It is desirable, in many instances, to pick specific locations or alternative sites for the concentration of industry so that public utility requirements of industry can be provided more efficiently, traffic problems confined to one or a few areas, specialized police, fire and sanitation services better provided, and fair and equitable tax programs

34. Authority cited and text accompanying note 28 *supra*.
35. Craig, *supra* note 28, at 173.
36. — Del. at —, 183 A.2d at 579.
37. See Windsor, *The Planning, Platting and Developing of an Industrial District*, 1 PROCEEDINGS OF THE 1960 INSTITUTE ON PLANNING AND ZONING (The Southwestern Legal Foundation) 79 (1961).

more easily administered.[38] The effects of such planning are to attract new industry and to encourage present industry to stay. Some guides that have been suggested for considering potential sites for industrial development are: (1) the area should promote personnel stability;[39] (2) the area should facilitate industrial activity through integrated transportation facilities and sanitation and public utility services;[40] (3) the area should foster and promote diversification of industry in order to achieve a high degree of economic stability;[41] (4) the area should attract desirable industries rather than those which utilize marginal labor;[42] and (5) the area should be subject to minimum site standards through restrictive covenants or zoning controls which are flexible enough to meet the needs of technological change.[43]

Where, however, it is either impossible or impractical to choose a specific site in advance, the floating zone could be particularly useful as a device to provide a legal framework within which the individual developer is encouraged to locate the specific site which best meets the needs of his particular industry and to apply for reclassification of the area. This outlook was reflected in the report of the Zoning Commission in the *Huff* case.[44] Although a "new type industry"[45] was involved in that case, no reason is apparent why the same rationale is not equally valid for "old" industries which formerly were objectionable because of their product or process but now, due to research and technological development, have raised their level of performance.[46] Under certain conditions the use of the floating-zone device can effectively solve many of the perplexing problems inherent in the uncertainty of zoning for undeveloped areas and for industrial development and integration; however, the concept also has some very serious shortcomings which have been forcefully presented by a few courts and which deserve attention in some detail.

First, it is said that prospective buyers of property in areas subject to

38. *Id.* at 80-81.
39. *Id.* at 81-82.
40. *Id.* at 82-83; see Soule v. Town of Perinton, 152 N.Y.S.2d 734, 739 (Sup. Ct. 1956).
41. Windsor, *supra* note 37, at 85-86.
42. *Id.* at 86.
43. *Id.* at 83-85.
44. Huff v. Board of Zoning Appeals, *supra* note 31, at 54, 133 A.2d at 86.
45. See note 32 *supra.*
46. One noted authority in land-use planning has stated that professional planners now tend, more and more, to classify industries by performance rather than process or product, and the floating-zone device emphasizes standards of performance. Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552, 1561 (1961). Much emphasis in the hearings on Shell's petition was placed on expert testimony as to new developments in the petroleum industry with regard to water pollution, air pollution and conservation of natural resources. See Brief for Appellees, app. p. B70.

the floating zones cannot reasonably tell ahead of time the specific uses for which the surrounding lands are planned, since the zoning maps of the community do not indicate the future location of the floating zone.[47] Dissenting in the *Rogers* case, Justice Conway said:

> [A] person purchasing property in Tarrytown in a Residence A or B district to bring up his children now has no way of knowing whether the property next to his may not become the site of a multiple family dwelling with the attendant increase in population, traffic dangers, commerce and congestion.[48]

Other critics have said that, although a zoning order gives a property owner no vested right in the continuation of existing uses, the scheme of zoning should afford as much notice of change as possible.[49] The specific subject of notice was not taken up by the Delaware court, but it appears from Judge Stiftel's brief discussion of "delayed zoning" that the court felt that the incomplete and temporary nature of the plan gave general notice that the "proper authorities" would act in the future and thereby exert more control over the area.[50]

Second, the principle of piecemeal placement of zones in areas of differently zoned districts incorporates one of the traditionally evil features of spot zoning.[51] If spot zoning, defined in its descriptive sense, is "a carving out of one or more properties located in a given use district and reclassifying them in a different use district,"[52] the floating-zone process is particularly vulnerable to charges of flagrant spot zoning. Defining spot zoning in the descriptive sense emphasizes the size of the area rezoned and the fact that the new classification is different from the surrounding districts. The floating-zone idea, on the other hand, suggests that where a floating zone is involved the real evil in spot zoning is not the fact that the rezoned area is different from the surrounding zones, but rather that rezoning was accomplished for the benefit of an individual rather than for the general welfare. This proposition assumes, however, that the land use of the new zone is compatible with those of surrounding zones. From their analysis of the cases which

47. In Eves v. Zoning Bd. of Adjustment, *supra* note 8, at 218, 164 A.2d at 11, similar reasoning was used to invalidate a zoning amendment which included a restricted manufacturing district not placed on the zoning map and which, after presentation of a specific proposal, was applied to land formerly zoned residential.

48. Rogers v. Village of Tarrytown, *supra* note 29, at 130, 96 N.E.2d at 738.

49. Eves v. Zoning Bd. of Adjustment, *supra* note 8, at 218, 164 A.2d at 11.

50. See text accompanying note 23 *supra*.

51. See Rogers v. Village of Tarrytown, *supra* note 29, at 128, 96 N.E.2d at 737 (dissenting opinion); Eves v. Zoning Bd. of Adjustment, *supra* note 8, at 218, 164 A.2d at 11.

52. Chayt v. Maryland Jockey Club, 179 Md. 390, 393, 18 A.2d 856, 858 (1941); see Annot., 51 A.L.R.2d 263 (1957).

have dealt with ordinances of the floating-zone type, Professor Haar and Mrs. Hering suggest that the courts are possibly more willing to accept the concept where it clearly appears that the legislative body has determined in advance that the unplaced zone is compatible with the other zones in the ordinance.[53] Furthermore, in the *Huff* case the zoning ordinance was sanctioned on the basis that the advance legislative determination had been made that the type district involved was compatible with residential development under proper conditions.[54] In the *Costello* case, the court said, "Moreover, since the trailer park area is also residential in character, it appears that the reclassification is neither incompatible nor inconsistent with the remainder of the areas in the residential district."[55] The court in the *Rogers* case did not deal with the compatibility of the zones as such, but it is apparent that the court had compatibility in mind when it said: "The board undoubtedly found . . . that garden apartments would blend more attractively and harmoniously with the community setting, would impose less of a burden upon village facilities, if placed upon larger tracts of land rather than scattered about in small units."[56] On the other hand, Professor Haar and Mrs. Hering have further observed that the floating-zone ordinance which was invalidated by the Supreme Court of New Jersey in the case of *Rockhill v. Chesterfield Township*[57] was not based on an *advance* determination of compatibility but seemed to be based on the principle that "compatibility should be determined in terms of individual users and in light of circumstances existing at the time the new use is proposed."[58] Where the court feels that a valid legislative determination has been made that the new use is compatible with the surrounding use districts, the term "spot zoning" takes on a somewhat specialized meaning and the emphasis shifts from defining it in the descriptive sense to what has been called the mixed descriptive and legal sense.[59] In the *Rogers* case, for example, the court said:

> Defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owners of such property and to the detriment of other owners . . . "spot zoning" is the very antithesis of planned zoning. If therefore an ordinance is enacted in

53. Haar & Hering, *supra* note 46, at 1571-72; see Craig, *supra* note 28, at 179.
54. 214 Md. at 59, 133 A.2d at 89.
55. 223 Md. at 29, 161 A.2d at 826.
56. 302 N.Y. at 122-23, 96 N.E.2d at 734.
57. 23 N.J. 117, 128 A.2d 473 (1957) (invalidating an ordinance which zoned an entire municipal area into agricultural and residence districts and provided for "all manner of special uses" including "neighborhood business" and "light industrial" and "other similar facilities," and which were to be placed by local discretion according to certain conditions and specifications).
58. Haar & Hering, *supra* note 46, at 1572.
59. Annot., *supra* note 52.

> accordance with a comprehensive zoning plan, it is not "spot zoning," even though it (1) singles out and affects but one small plot . . . or (2) creates in the center of a large zone small areas or districts devoted to a different use . . . . *Thus the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare.*[60]

Notice that the New York court stresses who benefits from the rezoning action rather than the size of the area rezoned or the fact that the method involves a piecemeal technique. The reason is that where the differently zoned district is compatible with the surrounding zones, the mere fact that it is different does not, in itself, create harm. It thus appears that the true dangers inherent within the floating-zone idea are favoritism to an individual owner to the detriment of the general welfare and the lack of advance legislative determination that the floating zone is compatible with the other zones in the ordinance or area. To the extent that a claim of "spot zoning" does not safeguard against these dangers, it is not compatible with the concept of the floating zone.

The *Shell* court defined spot zoning mainly in terms of its descriptive sense when it said:

> Plaintiff's argument that the Levy Court was guilty of spot zoning in this instance cannot be sustained. The area involved in the present amendment consists of 2,625 acres. "Spot Zoning" is generally defined as an attempt to wrench a small lot or small area from its environment and give it a new rating which disturbs the tenor of the community . . . .[61]

If the Delaware court had been concerned with the real evils of "delayed" zoning, it is curious that they would have defined "spot zoning" on that basis. However the brief resolution of this issue by the Delaware court does state that although Shell benefited by the rezoning, the expansion and development of the industry in Delaware was "designed to serve the general welfare" and not that of any individual or group.[62] Although the court did not touch on the compatibility of the new zone with the others in the Zoning Code or with the agricultural zone in particular, the court could have had in mind that the Levy Court did consider the question of compatibility in light of the circumstances existing at the time of the hearings on Shell's application, since much emphasis was placed on technological advances in

60. Rogers v. Village of Tarrytown, *supra* note 29, at 123-24, 96 N.E.2d at 734-35. (Emphasis added.)

61. —— Del. at ——, 183 A.2d at 579.

62. *Id.* at —, 183 A.2d at 579-80.

the refining industry.[63] In this respect an interesting comparison might be drawn between the *Shell* case and the *Chesterfield Township* decision, which, as previously suggested,[64] may have invalidated the floating-zone provision in question on the basis of lack of *advance* legislative determination of compatibility.

The last major danger in the administration of such an ordinance is that the personal motives of the commissioners or the political power of the applicants could have a decisive effect upon zoning decisions, thereby subordinating both benefit to the community as a whole and redistricting according to the best use of the land.[65] There is a fundamental and significant distinction between a situation where a zoning authority promulgates rules, regulations and ordinances applicable to everyone and a situation where ordinances are enacted which apply only to the property of the applicant on a case-by-case basis. In the former, the authority exercises a legislative function; in the latter, the board exercises primarily an adjudicative function. Professor Davis writes as follows:

> Intrinsically, rule making involves less danger of arbitrary action and injustice than adjudication, because the results of adjudication may be unfair in all the ways that rules and regulations may be unfair and in addition may discriminate against the individual party.[66]

If an adjudication can arbitrarily deny individual rights in the absence of proper safeguards, such procedure likewise can bestow favor upon an individual in a zoning action, thereby subordinating the best interests of the public. We have already seen that where rules and regulations are promulgated which are meant to apply to everyone alike, the main function of a claim of spot zoning should be to point out that a particular zoning action benefits an individual rather than the general welfare. The Supreme Court of the United States has said that local acts delegating the power to adjudicate must set up standards to *preclude* discriminatory or arbitrary action by officials.[67] Apprehensions of arbitrary and discriminatory actions in the case of a floating-zone ordinance are clearly bottomed in the legal implications arising out of the case-by-case technique.[68] Professor Haar and Mrs.

63. See note 46 *supra*.
64. See authorities cited and text accompanying notes 57 and 58 *supra*.
65. Cases cited note 51 *supra*.
66. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.11, at 122 (1958).
67. Kunz v. New York, 340 U.S. 290 (1951).
68. The Supreme Court of Pennsylvania subsequently discussed its decision in Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960), as follows:

> [I]n that case the zoning ordinance involved authorized changes on a case-by-case basis without any specified orderly planned use which meant in the end that the utilization of the land became dependent upon the solicitation of individual land owners and the unlimited discretion of the township supervisors.

Pumo v. Borough of Norristown, 404 Pa. 475, 478-79, 172 A.2d 828, 830 (1961).

Hering have suggested that where adequate regulations prescribing specific standards are set up in advance so that applications are passed upon more objectively, the courts are more willing to validate the floating-zone ordinance.[69] In the *Rogers* case, "exacting standards of size and physical layout" were prescribed in advance by the ordinance which initially created the new zone. The opinion in the *Costello*[70] case clearly indicates that the court attached much weight to the fact that standards for a trailer park were set out in advance and consisted of regulations as to design, layout, health requirements, height and area. The court pointed out that these standards should be met before a rezoning order allowing the establishment of the new district would become effective. The court stated that the standards, though not "elaborate," were "sufficiently definite" and certainly not "vague and illusory." The court also said that the rezoning action "needed only to have been fairly and reasonably within the scope of the regulations set forth for the newly created T-2 zone to render the reclassification valid."[71] The generally applied criteria and the additional safeguard of judicial review should sufficiently protect against arbitrary and discriminatory action.[72] In other words, the theory with regard to the case-by-case aspect of the floating-zone concept suggests a delicate balance between desired flexibility through limited discretion of zoning boards and adequate safeguards against arbitrary actions in the form of standards specifically pertaining to the unplaced zone and review by the courts.

The Zoning Code in the *Shell* case, like a typical floating-zone ordinance, specifically invites individual applications and provides for action thereon.[73] With reference to the Zoning Code as a whole, the Delaware court pointed out that the enabling act establishes adequate standards for the adoption of zoning *regulations*.[74] The court felt that the provision which included a

69. Haar & Hering, *supra* note 46, at 1571.

70. *Supra* note 33.

71. *Id.* at 34, 161 A.2d at 829.

72. See Rogers v. Village of Tarrytown, *supra* note 29.

73. Text accompanying note 17 *supra*.

74. DEL. STAT. ANN. tit. 9, § 2603(a) (1953) provides as follows:

(a) Regulations . . . shall be designated and adopted for the purpose of promoting the health, safety, morals, convenience, order, prosperity or welfare of the present and future inhabitants of this State, including amongst other things, the lessening of congestion in the streets or roads or reducing the waste of excessive amounts of roads, securing safety from fire and other dangers, providing adequate light and air, preventing . . . excessive concentration of population and . . . excessive and wasteful scattering of population or settlement, promoting such distribution of population and such classification of land uses and distribution of land development and utilization as will tend to facilitate and provide adequate provisions for public requirements, transportation, water flowage, water supply, drainage, sanitation, educational opportunities, recreation, soil fertility, food supply, protection of the tax base, securing economy in governmental expenditures, fostering the State's agricul-

*case-by-case* determination was within the prescribed standards for *legislative* action. It is possible that the *Shell* court has misconceived the function of the Levy Court in this regard. The Levy Court has, in effect, legislated for itself the power to decide cases on an individual basis, yet has provided no additional standards for the granting or denial of individual applications for rezoning. The courts which have upheld floating-zone ordinances have recognized the potential danger in the case-by-case approach, and have sought to check the possibility of arbitrary action by requiring standards separate from and in addition to those in the state enabling act.

In the original action, the plaintiff took depositions from the three commissioners of the Levy Court, in which statements the members outlined their reasons for the decision on Shell's application. The supreme court held that the depositions were inadmissible, stating: "It is well established that the courts will not inquire into the motives of members of a legislative body to determine the validity of legislation except where there is a showing of fraud or bad faith."[75] The question remains, however, whether the Levy Court is performing a legislative function when it receives individual requests for rezoning which are "studied and acted upon on their own merits." A reading of some of the testimony of the Levy Court commissioners which was held inadmissible strongly suggests that, within the framework of the case-by-case determination, arbitrary and discriminatory action could exist in the granting or denial of a rezoning request.[76]

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tural and other industries, and the protection of both urban and non-urban development.

(b) The regulations shall be made with reasonable consideration, among other things, of the character of the particular district involved, its peculiar suitability for particular uses, the conservation of property values and natural resources and the general and appropriate trend and character of land, building and population development.

75. —— Del. at ——, 183 A.2d at 580.

76. Portions of the inadmissible testimony of one of the commissioners is as follows:

Q. On the basis of the record did you feel that Shell had failed to show any necessity for rezoning an area that large?
A. Right.
Q. Did you feel that the rezoning was not in accordance with any plan for the development of that area?
A. It appeared to me that it was just an attempt to control as much acreage as they could possibly control in that area. There was no need established for that much for a refinery. Certainly not.
Q. Did you feel that the rezoning of that area should be done in accordance with a long range plan for development of that area?
A. That was my feeling.
Q. Did you feel that the rezoning that was done was done solely for Shell?
A. There is no doubt about that. . . .
Q. Did you feel that the other two members' action was dictated solely by the feeling that unless they rezoned all but 600 acres Shell wouldn't locate in that area?
A. That was my impression. . . .
Q. Rezoning so far as Shell was concerned was different from rezoning that would be done for any other developer, was it not?

In conclusion, the floating-zone device has been effectively used in a few instances in undeveloped areas and may prove to be equally useful in meeting local problems regarding industrial integration and development *if* the device is recognized by the courts as a new and unique concept in zoning with its own special problems. The goals of zoning have not changed, but new and more flexible means are being devised, means which have yet to be perfected and reconciled by the courts with regard to accepted zoning principles. The inherent flexibility in the floating-zone device, wherein lies its virtue, also emphasizes its danger in application. From this examination of the floating zone as it has been sanctioned along with certain safeguards in some jurisdictions, it would appear that if the provision in the New Castle County Zoning Code is a floating-zone concept, the *Shell* decision goes far beyond what would be accepted in the jurisdictions of the *Rogers* and *Huff* cases. There is no indication that any advance determination of compatibility has been made by the Levy Court, since it has enabled itself to scatter three broad categories of districts—residential, commercial and industrial—through-

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A. In what way?
Q. It was different in the sense that Shell was granted far more acreage than they could prove the necessity for having rezoned.
A. Yes.
Q. In other situations the Levy Court would only rezone what a petitioner had shown was necessary for his present purpose?
A. That is normal procedure.

Brief for Appellants, app. pp. A101-03, A108. A portion of the testimony of another commissioner is as follows:

Q. Then did you concur that Shell should be contacted?
A. Yes, this way. We all had three different opinions. Mr. Lambert had an opinion at first that he wanted to give them 500 or 550; then he said he would go along with 1,000 acres. Mr. Roberts suggested 80%. I said, "Look, I don't care whether it goes for 1,000 or 80%, I am in favor of giving the whole thing to Shell."
Q. Why was that?
A. Because I feel that an industry coming here is going to help us, it is going to help the community, and I felt that it was a betterment for the community itself . . . .
Q. So that no matter how much land had to be rezoned you felt that rezoning ought to be granted to insure Shell's coming here, is that correct?
A. Right, for long range planning.

Brief for Appellants, app. pp. A127-28. A portion of the inadmissible testimony of the third commissioner is as follows:

Q. Let me see if I get the general outline clear. Is it correct that you felt that Shell had offered publicly to leave some part of the lands under option to the Fish and Game Commission, and therefore this part ought not to be rezoned?
A. That is what I thought, that's right . . . .
Q. Your decision that you wouldn't go along with the 20% was based on the offer of the Shell representative to the Board of Fish and Game Commissioners, is that correct?
A. In part, yes.
Q. What was the other part?
A. I felt that that land, I have lived there for many years, is a good ducking spot.

Brief for Appellants, app. pp. A164-65.

out the portions of the county zoned R-2. Also, the important problem of the commissioners' discretion in the case-by-case determination is left unrecognized by the Delaware court, yet the valid floating-zone ordinances have included standards, apart from those set out in the original enabling act, which specify in advance the qualifications for favorable action on a rezoning application and provide a substantial check on possible arbitrary action by the commissioners. If, however, the relevant portion of the Zoning Code was not meant to be a floating-zone provision but rather a new concept of "delayed zoning," the analogy to the floating zone points out some serious weaknesses in this approach.

Whatever position the Delaware courts finally take, they ought to be disposed to thinking and speaking in terms of workable guides in contemplation of future problem areas rather than pretending the land had never really been zoned prior to the rezoning application. The approach employed in *Shell* may solve the immediate legal problems while the ultimate ones go unheeded. The transition of the Delaware coastal area from agriculture to heavy industry is not to be taken lightly. Although the rezoning action in *Shell* may have been expedient and desirable in the broad sense,[77] the precedent set by this case may well give rise to problems with regard to future decisions of the Levy Court which may not be so easily resolved in terms of what is clearly for the public welfare.

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77. An executive of Shell Oil testified before the Levy Court: (1) that the initial installation would employ between 400 and 500 people, (2) that there will be a yearly expenditure in the State of Delaware of roughly $12,250,000 and (3) that there will be an additional tax revenue of $250,000 to the State. Brief for Appellees, app. B77-78.

# COMMONWEALTH EX REL. HOWELL v. HOWELL: COLLEGE EXPENSES AS AN ELEMENT OF SUPPORT

In *Commonwealth ex rel. Howell v. Howell*,[1] the Superior Court of Pennsylvania affirmed a support award designated to be applied to the college expenses of an eighteen-year-old child. The specific order appealed from required appellant to pay the college tuition of his daughter to the extent of the proceeds from an educational life insurance policy which he had obtained some ten years earlier. Although the superior court affirmed, three divergent opinions resulted concerning the elements requisite to the law's emburdening a father with the duty to pay the college expenses of his minor child. The elements considered in each opinion range from an express agreement by the father to pay his child's college expenses to a determination made solely upon general support criteria, requiring no agreement whatever upon which to base a duty. In between these two extremes lies the opinion of the majority, based upon neither of these avenues of recovery alone but instead upon a theory which appears to be a hybrid of both contract and traditional support law. This Case Note will review the support law in Pennsylvania with reference to the matter of college expenses as an element of the support award.

The action of support in Pennsylvania is a quasi-criminal action which is prosecuted by the Commonwealth on behalf of the party allegedly entitled to support. The duty of a father to support his unemancipated minor child[2] is not a contractual duty, but rather one which goes to the very roots of the common law.[3] Generally, this duty of support includes the duty to provide such food, clothing, shelter, medical care, and education as are necessary. These *necessaries* are relative and vary with the station in life of the parties.[4]

1. 198 Pa. Super. 396, 181 A.2d 903 (1962) (Ervin, J., and Montgomery, J., filed dissenting opinions. Montgomery, J., was joined by Rhodes, P. J.).

2. The word "children" as used in the Pennsylvania statute enabling the court to order support payment was intended to denote persons under twenty-one years of age. Commonwealth *ex rel.* O'Malley v. O'Malley, 105 Pa. Super. 232, 161 Atl. 883 (1932), construing PA. STAT. ANN. tit. 18, § 4733 (1953). However, the father's duty may expire at an earlier age, upon proof that the child is self-supporting. See Commonwealth *ex rel.* Gilmore v. Gilmore, 97 Pa. Super. 303 (1929). The duty may also continue beyond the twenty-first birthday where the child is not physically or mentally able to engage in profitable employment, or when employment is not available to him at a supporting wage. See Commonwealth *ex rel.* Groff v. Groff, 173 Pa. Super. 535, 98 A.2d 449 (1953). However, there is a presumption that when the child comes of age the reciprocal duties between father and child cease. Commonwealth *ex rel.* O'Malley v. O'Malley, *supra* at 234, 161 Atl. at 884.

3. 1 BLACKSTONE, COMMENTARIES 450 (Wendell's ed. 1854).

4. See, *e.g.*, Commonwealth *ex rel.* Adler v. Adler, 171 Pa. Super. 508, 90 A.2d 389 (1952).

When a court is called upon to determine whether a certain item should be included as an element of a support award in a particular case, it must exercise its discretion and determine whether the item constitutes a *necessary* under the circumstances.[5] Review of such determinations is normally limited to the question of abuse of that discretion.

When the duty to provide a certain item is a contractual one, it is immaterial whether or not the item is a necessity under the particular circumstances presented. Contract duties generally are privately imposed and should not be burdened with an evaluation of the criteria upon which support awards are based. In the same vein, the determination in a support action should not be restricted by the requirements of an enforceable agreement or anything approaching an enforceable agreement. These two avenues of recovery are theoretically separate and, though some elements may have mutual significance in a particular case, they are not interdependent. However, the support law in Pennsylvania now manifests itself as an offspring of both contract and traditional support principles. This hybrid is evidenced by the decision of the superior court in the *Howell* case.

The appellant was a graduate of Temple University School of Pharmacy and sole proprietor of a pharmacy which he had owned for over twenty years. The mother was also a college graduate. Their daughter graduated from high school in 1961 in the fourth quintile of her class. She then was admitted to Temple Community College in the secretarial course.[6] In 1952 the North Carolina Mutual Insurance Company had issued an endowment policy in the face amount of $1500 on the life of the daughter, who was then nine years of age.[7] The appellant was the named beneficiary in the policy and had exercised complete ownership and control over the policy including the payment of premiums. It had always been within appellant's power to exercise the borrowing privileges under the policy and to use the proceeds for any purpose he should desire,[8] although at the time the policy was issued, it was appellant's intention to use the proceeds for the higher education of his daughter.[9] The lower court refused to consider the ability of the daughter to support herself, her aptitude for advanced education, or the general financial ability of the appellant to pay for her college education.[10] The lower court found no enforceable agreement upon which its decision could be based, but instead relied upon the intention of appellant expressed at the time the

5. See, *e.g.*, Commonwealth *ex rel.* Dugan v. Dugan, 162 Pa. Super. 10, 56 A.2d 683 (1948).
6. Record, Vol. II, p. 5a.
7. Supplemental Brief for Appellant, p. 2.
8. Supplemental Brief for Appellant, p. 4.
9. Record, Vol. I, p. 3a.
10. Record, Vol. I, p. 2a.

insurance contract was entered into, that his daughter should receive advanced education. The court appeared to treat this expression of intention as if it were an enforceable agreement which rendered unnecessary an examination of support criteria.[11]

The majority opinion in the superior court held that the circumstances warranted the award within the framework of the law as stated in *Commonwealth ex rel. Martin v. Martin*,[12] and that the lower court had not abused its discretion, even though there was no express agreement. In the *Martin* case the father was held liable for the college expenses of his minor child. One reason given was that the father had set up an insurance trust agreement to educate his children. However, the insurance policy in the *Martin* case was held to be a confirmation of an agreement between Martin and his wife providing for the child's education. In the *Howell* case there was no evidence of an agreement between Howell and his wife for the policy to confirm.

In the dissenting opinion of Judge Montgomery in the *Howell* case, concurred in by President Judge Rhodes, the belief was expressed that under *proper circumstances* an express agreement is not necessary and, whether or not such agreement is found, the court must still weigh the financial ability of the father in making any such award.[13] Judge Ervin also dissented, his opinion being that in order for a father to be held financially responsible for a child while in college, the court must find an express agreement and in addition must weigh the father's financial ability to undertake this burden.[14] Judge Ervin is thus the only one who would require an express agreement under all circumstances, while all three dissenting judges would require an evaluation of the father's general financial ability before any such award could be made. This evaluation of the father's overall financial ability is common to all support actions. On the other hand, the majority would require something less than an express agreement, yet they would not require the evaluation of general support criteria, at least not to the extent of a thorough examination of factors such as the father's overall financial ability.

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11. See Record, Vol. II, p. 18a.

12. 196 Pa. Super. 355, 358, 175 A.2d 138, 139 (1961), where the court held:
> In the absence of an express contract, *and* unless the circumstances warrant it, a parent is not liable for the support of a child attending college . . . . On the other hand, where there is an agreement to support *and* it is within the contemplation of the parties, a father may be liable to support and furnish his child with a college education. (Emphasis added.)

13. 198 Pa. Super. at 404, 181 A.2d at 907. Judge Montgomery expressed the view that the father's finances should have been evaluated; he then explained his dissent in light of Judge Woodside's concurring opinion in Commonwealth *ex rel.* Martin v. Martin, *supra* note 12, at 360, 175 A.2d at 140, in which he and Judge Flood had joined, wherein the belief was voiced that no express agreement need be required today.

14. 198 Pa. Super. at 399, 181 A.2d at 906-07. Judge Ervin construed PA. STAT. ANN. tit. 18, § 4733 (1953), which requires fathers to be of "sufficient ability to pay," as applying to the agreement situation also.

In order to appreciate fully the relative merits of the three opinions, it is necessary to analyze the evolution of this problem. The underlying conflict within this problem area has been well summarized as follows:

> The education of children in a manner suitable to their station and calling, is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state. . . . A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance.[15]

Generally a father is held to be under a legal duty to provide his wife and children with necessaries suitable to their condition.[16] There appears to be agreement that certain educational achievements are necessary in every case. The difficulty arises over the determination of the education level to be considered necessary in a given fact situation. At first glance, this problem would appear to be a modern one. On the contrary, it is a recurring one with the level of education being the only changing factor. In 1929, the court was faced with this same problem in *Commonwealth ex rel. Gilmore v. Gilmore*,[17] which involved a father's petition to vacate a support order for a son who had reached sixteen years of age, the age at which compulsory school attendance ceased. In dismissing the petition, the court held that a father may be required to give his minor children such education in the public schools as reasonably accords with the father's ability and position in life, as well as the child's educational ability, progress, and prospects.[18] The court realized that education was a factor to be considered in the determination of the support and maintenance award and that the level necessary was relative to a given set of circumstances before the court at a particular time. The superior court followed the rationale set forth in the *Gilmore* case in *Commonwealth ex rel. Gillen v. Gillen*,[19] where it was stated that a father of modest financial means should not be required to maintain and to send to college two sons who were almost of majority age. The court, however, did not preclude the inclusion of college expenses in a support award where the evaluation of proper support criteria warrants their inclusion. The importance here lies not in what was decided but in the fact that support determination criteria, such as the financial condition of the father, were considered by the court in making its decision. Previous to *Howell*, however,

15. KENT, COMMENTARIES 196 (12th ed. 1873).
16. Commonwealth *ex rel.* Adler v. Adler, *supra* note 4; see also Commonwealth *ex rel.* Bowie v. Bowie, 89 Pa. Super. 288 (1926).
17. *Supra* note 2.
18. *Id.* at 308.
19. 102 Pa. Super. 136, 156 Atl. 572 (1931).

although a provision for education had been referred to as an element which might or might not be properly includable in a support award, such an element was never in fact included in any award in the absence of an express agreement.

In 1944, in *Commonwealth ex rel. Binney v. Binney*,[20] the superior court handed down a decision which virtually renounced college expenses as a possible factor in a maintenance and support award. The case involved a father's appeal from an order which required him to pay fifty dollars per week for the support of his wife and minor children, and to pay $1500 annually for the maintenance and education of a nineteen-year-old son attending college. Upon finding no agreement by appellant that such payment be made, the superior court vacated that part of the order relating to the son at college. The court reasoned that worthy parents all over the world do not furnish their offspring with college education and no one says that they have a legal duty to the child or to the state. The court continued that a parent "is entitled to a measure of discretion, and must be allowed to exercise his own judgment."[21] This line of reasoning was carried to its logical extreme in *Commonwealth ex rel. Rice v. Rice*,[22] where the court said:

> If a court could compel a father who is separated from his wife and children to maintain his children at college it could compel parents not separated from their children to do likewise. Thus, the courts and not the parents would determine who should and who should not have a college education and the type of education to be afforded. We have not yet arrived at this state of paternalism.

This same argument was rejected by the Washington Supreme Court in its consideration of *Esteb v. Esteb*.[23] The court there reasoned that when the father has custody of the child the law presumes that he will "properly" educate him, but when the father does not have custody, he does not have the child's talents and abilities exhibited before him daily and therefore might not fully appreciate them. Also, when the father is deprived of the child's custody, which is often the case when parents are separated or divorced, he might refuse to do what a father's natural instinct would normally prompt him to do.[24]

Since 1944, a number of cases[25] have been decided which rely on

20. 146 Pa. Super. 374, 22 A.2d 598 (1944).
21. *Id.* at 380, 22 A.2d at 601.
22. 1 Adams L.J. 91, 92 (Pa. C.P. 1959).
23. 138 Wash. 174, 244 Pac. 264 (1926).
24. *Id.* at 184, 244 Pac. at 267.
25. See, *e.g.*, Commonwealth v. Cooke, 34 Del. Co. 395 (Pa. C.P. 1946), where the court held that a father may be compelled to support his son through high school even after the child has exceeded the statutory attendance requirement, but may not be compelled to finance him through college, even though the latter course was well within his financial means.

*Commonwealth ex rel. Binney v. Binney*,[26] the case which virtually canonized the father's discretion in this area. In *Commonwealth v. Wingert*,[27] the court refused a petition for increased support to pay the college expenses for a daughter seventeen years of age. The court based its decision on the utility of the course pursued and ignored the professional status of the parents, the relatively high income of the father ($22,500), and the exceptional abilities of the child. The school was classified as a finishing school by the court, and one which would not prepare her for any particular station in life. The court also felt that the school may merely have represented an avenue for continued support.

In *Commonwealth v. Cisney*,[28] the court relied on the *Binney* and *Wingert* cases and held that, in the absence of *unusual circumstances*, a father could not be compelled to contribute to the support of a child attending college.[29] The court made no attempt to foresee what these unusual circumstances might prove to be. It thus appears that the language used by the superior court in the *Binney* and *Wingert* cases was interpreted by most lower courts as a definite prohibition against the inclusion of college expenses in a maintenance and support award, or extension of support through the college years of the minor, under any circumstances except the most unusual ones. Usually nothing less than an express agreement would be acceptable. This reliance on the *Binney* decision is still with us today as evidenced by the dissenting opinion of Judge Ervin in the *Howell* case.

As the courts became more cognizant of the value of advanced education, they became more willing to find an agreement to which they could attach an order for the payment of college expenses by the father. An example of this trend is *Commonwealth ex rel. Stomel v. Stomel*,[30] which involved an appeal by the defendant-father from an order directing him to pay fifty dollars per week for the support of his wife and two sons, and in addition directing him to pay the college tuition of the two sons. One son was nineteen years of age and in college. The other son was a seventeen-year-old high school graduate who was enrolled in college, but had not yet begun his studies. The agreement found was not a written one, but a statement in open court by the father to the effect that he agreed to support his wife and the younger son. The court was to determine the amount. Judge Ervin, who expressed the opinion of the court, found the order not excessive as to the son agreed upon, but refused to extend the order to the older son not agreed

26. *Supra* note 20.
27. 173 Pa. Super. 613, 98 A.2d 203 (1953).
28. 6 Cumb. L.J. 95 (Pa. C.P. 1956).
29. *Accord*, Commonwealth v. Fleming, 17 Monroe L.R. 9 (Pa. C.P. 1955); Commonwealth v. Yoh, 71 Montg. Co. L.R. 20 (Pa. C.P. 1953) (dictum).
30. 180 Pa. Super. 573, 119 A.2d 597 (1956).

upon. The court held that at the time the father made the agreement to support the younger son, he knew that he was enrolled in college, and therefore that it was within the *contemplation of the parties* that the father should pay for his son's tuition at college. This decision would seem to show a tendency by the court, once an agreement is found, to extend the liability under the agreement to cover a college education even where college expenses are not expressly an element. The decision in the *Stomel* case would still seem to represent Judge Ervin's interpretation of the law.[31]

In *Commonwealth ex rel. Grossman v. Grossman*,[32] the superior court again demonstrated that, in absence of a contract, it would not recognize any legal duty imposed upon a father to educate his child after high school, but that once a contractual duty could be found, it would look to the circumstances of the case to determine what this duty entailed. In *Grossman*, the father had entered into a support agreement whereby he was to pay fifty dollars per week for the support of his wife and twenty-five dollars per week for the support of his children until the younger son had "completed his schooling." Upon the son's graduation from high school, the father filed a petition to vacate the order. The court, however, found it to be within the contemplation of the parties that the father would pay for his son's support while he was attending college. In making this determination, Judge Ervin looked to the income and professional status of the father and the scholastic achievements and potential of the child, and found that the court below properly refused to allow vacation of the support order.[33]

The decision in the case of *Commonwealth ex rel. Martin v. Martin*,[34] which was handed down by the Superior Court of Pennsylvania in 1961, was relied upon by the majority in the *Howell* case. In the *Martin* case the defendant-father had expressly agreed to provide his daughter with a "secondary education beyond high school."[35] He had entered into an insurance trust agreement (the policy being on his life) to provide his daughters with an education.[36] The court found the insurance trust to be a confirmation of the express agreement entered into by the husband and wife at the time of their divorce; it was this agreement upon which the decision was based, rather

31. See text accompanying note 14 *supra*.

32. 188 Pa. Super. 236, 146 A.2d 315 (1959).

33. *Accord*, Commonwealth v. Byerly, 9 Chest. Co. Rep. 260 (Pa. C.P. 1960); *but cf.* Commonwealth v. Kinek, 24 Pa. D. & C.2d 467 (C.P. 1961).

34. *Supra* note 12.

35. Record, p. 16a, Commonwealth *ex rel.* Martin v. Martin, *supra* note 12.

36. The Orphans' Court of Westmoreland County found that the trust agreement was intended to provide funds for educational expenses even before the father's death and decreed that the trustee borrow against the loan value of the policy for the purpose of providing funds for the daughter's education. This decree had been affirmed by the Supreme Court of Pennsylvania in Martin v. Martin, 405 Pa. 282, 174 A.2d 663 (1961), prior to the Pennsylvania Superior Court's decision of the support dispute.

than the existence of the insurance trust itself. President Judge Rhodes in writing the majority opinion expressed the state of the law in the following manner: "In the absence of an express contract, and unless the circumstances warrant it, a parent is not liable for the support of a child attending college .... On the other hand, where there is an agreement to support and it is within the contemplation of the parties, a father may be liable to support and furnish his child with a college education."[37] A concurring opinion voiced the belief that an express agreement should not be required.[38]

The court in the *Howell* case, however, found no enforceable agreement which gave rise to a contractual duty although they did use contract talk when they held that a college education was within the contemplation of the parties at the time Howell manifested the *intention* to send his child to college.[39] It would appear that the court regarded the insurance policy as evidence of an intention on the part of the father to provide his child with a college education, or as evidence that it had once been within the contemplation of the parties that the child would go to college. Normally, an appraisal of what was in the contemplation of the parties at the time the contract was entered into is conducted in order to determine what the contract actually entailed. One is curious, however, as to the value of this process when no enforceable agreement was found to exist. Although a consideration of what was in the contemplation of the parties at some prior time could have some materiality in the absence of an agreement, namely, in an action based on general support determinants, its value would be to show that these parents are of the type who would send their children to college. In that setting, however, it would be only one of a number of factors considered in determining the support award rather than a requirement which is given equal status with an enforceable agreement.[40] What if there had been no insurance policy involved in the *Howell* case? In all probability it would then have been necessary for the court to resolve the case upon basic support principles which should involve at least a cursory consideration of the father's financial condition as well as other support criteria. One would think that the existence of the policy should not of itself materially change this procedure. It was merely an asset over which the father held the exclusive rights, and should have been considered as only one factor in the overall financial picture of the father.

37. *Supra* note 12.
38. *Supra* note 12, at 360, 175 A.2d at 140.
39. 198 Pa. Super. at 399, 181 A.2d at 905.
40. The majority in *Howell* seems to be interpreting the requirements stated in the summary of the law in Commonwealth *ex rel.* Martin v. Martin, *supra* note 12, in the disjunctive rather than in the conjunction as written.
41. See discussion in Commonwealth v. Cisney, *supra* note 28, at 97.

Perhaps the use of the *intention* upon which the decision in the *Howell* case was based represents a transitional step between the requirement of an agreement and an award based solely upon general support action criteria. The courts have always recognized the possibility that under *unusual circumstances* provision for advanced education might be includable in a support award notwithstanding the absence of an agreement to that effect,[41] but have never been willing to find these circumstances in a given case or to project what might be required. The agreement concept has been stretched in every possible case to include provision for college expenses within the contemplation of the parties.[42] The court in the *Howell* case, however, could find no agreement in the first instance; therefore, it was constrained to adopt a transitional approach which retained as many of the remnants of the agreement concept as possible.

It is not intended here to question the result in the *Howell* case, but it is contended that the decision should have been based upon a thorough evaluation of the factors which generally are considered in any support award, rather than upon a rationalization of result via contract analogy. The determinants of a support award are considered by courts so that the amount and duration of the award are reasonable and just. By rationalizing its decision by use of a contract theory, the court has possibly lost sight of the proper criteria and has paved the way for possible injustice in the future. The courts of Pennsylvania have traditionally recognized that there might be unusual circumstances where a father could be held liable for his child's college expenses in the absence of an agreement; however, by holding that a mere *intention* will satisfy this requirement, as was done in the *Howell* case, the court has relaxed the requirements and safeguards of an agreement without imposing the requirements and safeguards of an award based on the evaluation of support criteria.[43]

If in a given set of circumstances the court finds a college education to be a necessity for a particular individual, one would think that support should continue at least for his minority years if he attends college, even though he might be capable of self support. This is in effect the same problem which existed in 1929 when the superior court in *Commonwealth ex rel. Gilmore v. Gilmore*,[44] held that support should continue during the child's public schooling even though the statutory minimum[45] had been exceeded and the child was capable of self support. The distinction lies in the advanced

42. See, *e.g.*, Commonwealth *ex rel.* Stomel v. Stomel, *supra* note 30.

43. Evidence was proffered in the *Howell* case which, if it had been admitted, would have shown that Howell's income was $3500 or less per year. 198 Pa. Super. at 400, 181 A.2d at 905. Should not this evidence have been considered by the court?

44. *Supra* note 2.

45. PA. STAT. ANN. tit. 24, §§ 13-1326 to -1327 (1962).

level of education necessary today as compared to that required in 1929. Why then do not the courts of Pennsylvania include expenses for higher education as an element of the support and maintenance award when a thorough evaluation of general support criteria reveals the propriety of this result? This course is supported by numerous writers[46] and is followed in a growing number of jurisdictions.[47]

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46. See 15 U. MIAMI L. REV. 108 (1960); 31 MISS. L.J. 285 (1960); 35 NOTRE DAME LAW. 573 (1960); 21 OHIO ST. L.J. 455 (1960); 36 TUL. L. REV. 367 (1962).

47. Strom v. Strom, 13 Ill. App. 2d 354, 142 N.E.2d 172 (1957); See Pass v. Pass, 239 Miss. 449, 118 So. 2d 769 (1960); Cohen v. Cohen, 6 N.J. Super. 26, 69 A.2d 752 (1949); Mitchell v. Mitchell, 170 Ohio St. 507, 166 N.E.2d 396 (1960); Calogeras v. Calogeras, 163 N.E.2d 713 (Ohio 1959); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941); Esteb v. Esteb, *supra* note 23.

# *FRAZIER v. OIL CHEMICAL CO.*: RIGHTS OF ILLEGITIMATE CHILDREN UNDER PENNSYLVANIA'S WRONGFUL DEATH ACT

In a recent case, *Frazier v. Oil Chemical Co.*,[1] the Supreme Court of Pennsylvania held that illegitimate children have no right to participate in an action brought under the Wrongful Death Act[2] for the negligent killing of their putative father or to share in the damages recovered. The plaintiff, as widow and personal representative of the estate of the deceased, brought an action in the Court of Common Pleas of Delaware County against Oil Chemical Company under the Wrongful Death Act and the survival statute[3] for the recovery of damages for the death of Claude Frazier. A petition to intervene in this action was filed by the mother of two illegitimate children of the decedent. The grounds assigned for intervention were that the complaint did not include these children who, as "survivors of their father Claude Frazier . . . would be entitled to their proportionate share as children of any damages recoverable for his death."[4] The court dismissed the petition to intervene and the petitioner appealed.

In affirming the order of the lower court, the supreme court considered the following provision in the Wrongful Death Act: "The persons entitled to recover . . . shall be the husband, widow, children, or parents of the deceased, and no other relatives . . . and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy . . . ."[5] The court then decided that the word "children," as used in the act, denotes legitimate children, mainly because an illegitimate child is given no right of inheritance from his putative father by the Intestate Act.[6] The court emphasized that its decision was necessitated by the language of

1. 407 Pa. 78, 179 A.2d 202 (1962).

2. PA. STAT. ANN. tit. 12, §§ 1601-04 (1953). Section 1601 provides: "Whenever death shall be occasioned by unlawful violence or negligence . . . the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned."

3. The supreme court did not consider the question whether the petitioners could share in any recovery under the survival statute, since that action proceeds as if the decedent were suing for his personal pecuniary loss, and whatever is recovered goes to his estate. Therefore, those entitled to recover would be only those to whom the estate is distributable. In any event, declared the court, the action under the survival statute would properly be brought in the Orphans' Court. 407 Pa. at 80-81, 179 A.2d at 204.

4. Brief for Appellee, p. 21, Frazier v. Oil Chemical Co., *supra* note 1.

5. PA. STAT. ANN. tit. 12, § 1602 (1953).

6. PA. STAT. ANN. tit. 20, § 1.7(a) (1950), provides as follows: "For purposes of descent by, from and through an illegitimate, he shall be considered the child of his mother but not of his father."

the statute, and stated: "Any correction of this situation and an equation of the rights of illegitimates with those of legitimates must come not from this Court but from the legislature."[7] It is not the purpose of this Note to question the result in *Frazier*, but to examine the desirability of equating the rights of illegitimates and legitimates under the Wrongful Death Act.

The wrongful death statute was designed to provide a means by which those who suffered a loss by reason of the wrongful death of a near relative would be able to bring an action against the wrongdoers and recover in damages.[8] "[T]he damages recoverable are measured by the pecuniary loss occasioned to *them* through deprivation of the part of the earnings of the deceased which they would have received from him had he lived."[9] The intent was that those who had been dependent upon the deceased for maintenance might now be able to obtain a recovery from which they could support themselves, maintain their dignity, and not become a burden on society. The Intestate Act, on the other hand, was designed to provide for "the descent of the real and personal estates of persons dying intestate."[10] To achieve this purpose, the Intestate Act sets forth a preferentially ordered list of those capable of inheritance. The illegitimate child is excluded by this list from inheriting from his father in Pennsylvania. Taking the Wrongful Death Act and the Intestate Act then, and classifying them according to their purposes, it might be said that basically the Wrongful Death Act provides for an action for *support*, while the Intestate Act is clearly a law governing *inheritance*. The Wrongful Death Act is properly so categorized because it is limited to those enumerated relatives who can show a loss of support occasioned by the death of the deceased, and because the damages recoverable are measured by the pecuniary value of the support that was lost.[11]

This distinction between the purposes of these two pieces of legislation renders questionable the propriety of using the Intestate Act to limit those entitled to share in the recovery under the Wrongful Death Act. Some courts have disallowed attempted interjection of inheritance laws into this type of remedial legislation where the illegitimate child is concerned. In *Middleton v. Luckenbach S.S. Co.*,[12] the Court of Appeals for the Second Circuit, in deciding on the illegitimate's rights under the Death on the High Seas Act,[13] stated:

7. 407 Pa. at 89, 179 A.2d at 208.
8. Pezzuli v. D'Ambrosia, 344 Pa. 643, 26 A.2d 659 (1942).
9. *Id.* at 647, 26 A.2d at 661. (Emphasis added.)
10. PA. STAT. ANN. tit. 20, § 1.1 (1950) (Historical Note).
11. Pezzuli v. D'Ambrosia, *supra* note 8.
12. 70 F.2d 326 (2d Cir. 1934), *cert. denied*, 293 U.S. 577 (1934).
13. 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1958). Like the FELA, the Death on the High Seas Act provides a right of action for negligently caused death, specifically, those deaths occurring on the high seas. The purpose of the act is to

> There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these [illegitimate] children or the parents do not come within the terms of the act would be to defeat the purposes of the act. . . . The rule that a bastard is *nullius filius* [child of no one] applies only in cases of inheritance.[14]

While the court in *Middleton* was not faced with the Pennsylvania Intestate Act, it was dealing with the common law, which the Pennsylvania Intestate Act adopted as to the right of an illegitimate to inherit from his father.

The reasoning employed in *Middleton*, however, would seem to be no more than a policy argument against the use of the Intestate Act, unless it were shown that the illegitimate child is, in fact, being deprived of a right by his exclusion from recovery for wrongful death. It would seem that unless the illegitimate had some right which he could exercise against his father to gain support before his death, he would have no complaint at being excluded from those entitled to share in a recovery under the Wrongful Death Act after his death.

Under the common law, the illegitimate child was considered *nullius filius* and as such was denied the right of inheritance or support from his putative father.[15] Pennsylvania courts have followed this common-law rule and have stated that a putative father "has no duty of 'support' as the term is used."[16] By this it is meant that there is no duty of support that can be imposed in a civil suit, but rather that the duty is imposed by statute in a criminal action,[17] with the order of support being part of the sentence. Although the illegitimate has no right which the court would recognize in a civil suit, he does have a right to initiate a criminal action which, upon proper

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compensate those persons who, by reason of the wrongful death, have lost a substantial right of support. Lawson v. United States, 192 F.2d 479 (2d Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

14. 70 F.2d at 329-30.

15. See Robbins & Deák, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 COLUM. L. REV. 308 (1930).

16. Commonwealth v. Campagne, 40 Pa. D. & C. 478 (C.P. 1940) (dictum).

17. This action could proceed under either PA. STAT. ANN. tit. 18, § 4506 (1951) (fornication and bastardy), or PA. STAT. ANN. tit. 18, § 4732 (1945) (neglect to support a bastard child). Furthermore, the promise by an illegitimate not to bring a criminal action for support against the father is deemed sufficient consideration to bind the father to a contract for the payment of support to the child. See Rohrheimer v. Winters, 126 Pa. 253, 17 Atl. 606 (1889).

proof and conviction, would obtain support for him. It is true that upon the putative father's death, the illegitimate would be deprived of his right to obtain support by means of a criminal action.[18] However, the importance of this right to support in the present context lies in the recognition, by the legislature, of the duty rather than the circumstances under which it is enforced. The intent of the legislature in imposing this duty was "to ameliorate the injustice of the common law in relation to the status and rights of illegitimate children, and to convert the moral duty of the father into a legal obligation to provide for their support and maintenance."[19] It would seem that the reasoning behind the creation of this right should be carried over to give an illegitimate child a right to share in the sum recovered under the Wrongful Death Act. Before suggesting a possible remedy, however, it would be well to consider some of the policy reasons behind limiting those who can share in the sum recovered under the Wrongful Death Act to those entitled to take of the deceased had he died intestate.

One of the obvious advantages in using the Intestate Act to limit those who could share in a recovery under the Wrongful Death Act is that it provides a ready-made, time-tested order of distribution of the amount recovered. This order of distribution is further desirable because those entitled to take under the intestate laws are very often the same people whose loss of support the Wrongful Death Act was intended to compensate. It also eliminates possible quibbling over the respective amounts of recovery. Although the act limits recovery to "husband, widow, children, or parents of the deceased and no other relatives,"[20] there still would be a greater possibility of these individuals contesting an ad hoc apportionment than there is with an order of distribution.

Thus it is seen that limiting those entitled to share in the sum recovered under the Wrongful Death Act to those entitled to take of the deceased in case of intestacy does have merit. The use of the intestacy distribution performs a far greater service than it does harm. The problems of distribution will arise more times than will an illegitimate's claim. Any modification of the Wrongful Death Act, therefore, should by no means eliminate this method of distribution. A possible revision of the pertinent provision of the act would be as follows:

> . . . and the sum recovered shall go to them in the proportion in which they would take his or her personal estate in case of intestacy, except illegitimate children shall share in the sum recovered as though they were legitimate.

18. A criminal action cannot be brought against a dead man, and criminal penalties terminate upon death. Commonwealth v. Moran, 251 Pa. 477, 96 Atl. 1089 (1916).

19. Commonwealth v. Bertram, 143 Pa. Super. 1, 3, 16 A.2d 758, 759 (1940).

20. PA. STAT. ANN. tit. 12, § 1602 (1953).

With this modification the act would better serve its purpose, without unduly expanding its coverage. The illegitimate child would have to meet all the requirements that the legitimate child must meet in addition to the difficult burden of proving paternity. This would avoid the unfortunate result in the *Frazier* case.

An examination of similar federal legislation, to detect a possible trend to accord illegitimates equality with legitimates,[21] would be of value in determining whether the above-suggested change in the Wrongful Death Act should be made. The main purpose of the Federal Employers' Liability Act[22] is to provide the employees of common carriers engaged in interstate commerce with a uniform right of action for negligently caused injuries.[23] The FELA also provides for a right of recovery by the surviving dependents in case of a covered employee's negligently caused death.[24] It is this part of the act that is pertinent to this inquiry. The FELA is similar to the Wrongful Death Act in that it uses the word "children" in setting forth the beneficiaries of the award.[25] The courts of Pennsylvania have never decided whether illegitimates are to be included in the interpretation of the word "children" as used in the FELA. There are only two cases where the issue has been resolved. The first was *Hiser v. Davis*,[26] in which the New York Court of Appeals held that "the interpretation of the word 'child' or 'children' in such a federal statute, as including or not including illegitimate children, depends upon the law of the state wherein the statute is being enforced."[27] The court pointed out that in New York the word "child" in a statute or a will, without more qualification, means a legitimate child. The second case, *Hammond v. Pennsylvania R.R.*,[28] was decided by the New Jersey Superior Court in 1959.

21. Under the Pennsylvania Workmen's Compensation Act, PA. STAT. ANN. tit. 77, §§ 1-1025 (1952), as amended, PA. STAT. ANN. tit. 77, §§ 1-1021 (Supp. 1962), illegitimate children have been permitted to recover for the death of their father. Smrekar v. Jones & Laughlin Steel Corp., 137 Pa. Super. 183, 8 A.2d 461 (1939). However, the Workmen's Compensation Act specifically provides that the terms "child" and "children" shall include children to whom the decedent stood in loco parentis and who were members of the decedent's household at the time of his death. PA. STAT. ANN. tit. 77, § 562 (Supp. 1962). This provision has enabled children of no relationship whatsoever to the decedent to recover a compensation award. Mayfield v. Kerr, 102 Pa. Super. 532, 157 Atl. 506 (1931).

22. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

23. See HANNA, FEDERAL REMEDIES FOR EMPLOYEE INJURIES 106-13 (1955).

24. 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

25. *Ibid.*

26. 234 N.Y. 300, 137 N.E. 596 (1922).

27. *Id.* at 305, 137 N.E. at 597-98. For this proposition the court relied upon Seaboard Air Line Ry. v. Kenney, 240 U.S. 489 (1916), an early case construing the FELA which held that "next of kin" as mentioned therein must be determined by reference to applicable local law. The specific question presented in *Seaboard* was whether legitimate brothers and sisters of an illegitimate decedent were his next of kin because of their common motherhood.

28. 54 N.J. Super. 149, 148 A.2d 515 (1959).

In deciding the case against the illegitimate children, the court relied upon the *Hiser* case. It held that the word "child" must be interpreted according to the law of the state, and then stated that under common law in New Jersey, the illegitimate is *nullius filius* and as such has no right of inheritance from his father. The court also cited the New Jersey law of Descent and Distribution of Intestate Property,[29] which provides that illegitimates can inherit only by or through their maternal heirs or next of kin. On appeal, however, the Supreme Court of New Jersey reversed the judgment of the lower court, holding that illegitimate children are "children" within the FELA.[30] The court decided that, so long as its interpretation of the act did not disrupt state domestic policy, the interpretation should accord with the purpose and policy of the act, which is to compensate the surviving dependents who have suffered pecuniary loss. If the illegitimate falls into this category, he should be compensated. Regarding compatibility with state policy, the court concluded that this issue "calls for a judicial determination upon a reference to that part of the state law which relates to the subject matter of the federal act."[31] The court then decided that to allow the illegitimate to take under the FELA in no way disturbs domestic policy in New Jersey, but on the contrary, benefits it.

The New Jersey Supreme Court in this decision has put the doctrine of *nullius filius* in its proper perspective. *Nullius filius* should be limited to questions of inheritance,[32] and should not be incorporated without question in a remedial statute such as the FELA. Considering that the New Jersey and Pennsylvania intestate laws are similar, there would seem to be no domestic policy preventing Pennsylvania courts from reaching results like that reached in *Hammond* under the FELA. Furthermore, this reasoning would seem to support the proposed modification to the Pennsylvania Wrongful Death Act. Apart from the question whether the doctrine of *nullius filius* should be retained in any situation, there would seem no valid reason for importing it into such remedial legislation.

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29. N.J. REV. STAT. §§ 3A:4-1 to 4-12 (1953). Section 3A:4-7 deals with the rights of illegitimate children. The superior court also cited Seaboard Air Line Ry. v. Kenney, *supra* note 27, for the proposition that the word "children," as used in the FELA, should be determined in accordance with state law.

30. Hammond v. Pennsylvania R.R., 31 N.J. 244, 156 A.2d 689 (1959).

31. *Id.* at 250, 156 A.2d at 692.

32. Query, whether there is any modern justification for retaining this doctrine even for inheritance purposes.